Supreme Court, U.S.
FILED

JUL 18 2003

OFFICE OF THE CLERK

No. 03 220

In the

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX

Shelbra Haggins
Counsel of Record
140 Public Square
#708
Cleveland, OH 44114
(216) 696-2440
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

28 pp

(All footnotes trail the end of each document)

CASE NO. 1:00 CV 2866

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALLEN LEE MAY,
Plaintiff,

v.

GMC MANSFIELD, et al.,
Defendants.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the following: (1) Motion of Defendants International Union United Automobile, Aerospace & Agriculture Implement Workers of America ("UAW International") and UAW Local 549 for Summary Judgment (ECF #30) filed with the Court on January 7, 2002; and (2) Motion of Defendant General Motors Corporation ("GM") for Summary Judgment (ECF #31) filed with the Court on January 7, 2002. Plaintiff' filed Memoranda in Opposition to Defendants GM and UAW (ECF #40, #42, respectively) on February 21, 2002. Thereafter, Defendants filed their respective Replies (ECF #45, #46) on March 7, 2002. For the reasons that follow, Defendants Motions (ECF #30, #31) are GRANTED.

Procedural and Factual Background[1]

Plaintiff, Allen Lee May, filed the instant action, pro se, against GM his employer, and UAW International and UAW Local 549, on November 13, 2000. On September 25, 2001, Plaintiff filed an Amended Complaint against Defendants, with the assistance of counsel, pursuant to Title VII, 42 U.S.C. §§ 2000e, et seq., 42 U.S.C. § 1981, and Chapter 4112, et seq., of the Ohio Revised Code. Plaintiff also made allegations of breach of contract.

Plaintiff, an African-American, who was (and is currently) employed by GM as a pipefitter, alleges that Defendants UAW and GM discriminated against him on the basis of his race. Specifically, Plaintiff alleges discrimination with regard to the opportunity to perform overtime work, the opportunity to work during a 4th of July shut-down, the Union's failure to process his grievance regarding the denial of overtime, the disciplinary action against him, and the Union's revocation of his journeyman welder's card and the denial of a welding position.

Mr. May was hired by General Motors in or about October 26, 1983, as a journeyman pipefitter, in its Michigan facility. In April of 1997, he requested and received a transfer to GM's Mansfield facility. It is at this time that Plaintiff worked as a second-shift journeyman pipefitter in the Assembly Tool Builder group (hereinafter "ATB" group), belonging to the UAW Local 549, along with one other second-shift pipefitter, Gary Mills, who is Caucasian. At all relevant times herein, Plaintiff was also a member of the UAW International. Plaintiff is currently employed at the Mansfield GM facility, wherein the allegations of the instant complaint allegedly arise.

During Plaintiffs employment with GM, Plaintiff worked under a series of collective bargaining agreements negotiated between GM and UAW. Such agreements are known as the National Agreement, entered into by GM and the UAW International, and the Local Agreement, entered into by GM and UAW Local 549. The National Agreement establishes the working conditions of UAW members employed by GM, including the rights of the union members and the responsibilities of GM. On the local level, the Local Agreement governs various items including overtime and health and safety issues.

The National Agreement and Local Agreement govern what is known as "equalization of overtime." The "equalization" is an attempt to provide GM employees an equal opportunity to work overtime, according to their department and their classification. Notice of the equalization is displayed in each department According to the Agreements, overtime is charged to employees who actually work or are offered the overtime and refuse. The National Agreement states, in relevant part, as follows:

> Extra work periods of part-time operation and overtime should be equalized among the employees in the group engaged in similar work, as far as practicable. Information concerning equalization of hours status will be openly displayed in the department in such a manner that the employees involved may check their standing.

National Agreement, ¶ 71. The employee within a particular group with the lowest number of overtime

hours is the first employee to be given the opportunity to work overtime. Affidavit of Thomas Chiudiori, ¶ 3.

The Local Agreement provides that equalization of hours groups will be defined by department, by classification, by shift, unless otherwise mutually determined by the parties. Local Agreement, Local Equalization of Hours Agreement,' 3. Further, the Agreement states as follows:

> In all departments, daily overtime including early starts and third shift will be offered to the employee-on-the-job who is expected to work the overtime required in connection with their job, except that management will make every reasonable effort to replace those employees who desire to leave at the end of their regular shift. If more than one (1) employee is assigned to a job and only one (1) employee is to be retained on that job for daily overtime the employee-on-the-job will be determined in accordance with paragraph 71 of the National Agreement ... If the employee-on-the-job refuses the overtime, their replacement will be selected on the basis of their standing on the overtime board.

Local Agreement, ¶ 20(A).

As a pipefitter, Mr. May is part of the ATB group, and his employment at the Mansfield facility is governed by the Memorandum of Understanding Assembly Tool Builder Group ("Memorandum of Understanding'), which is part of the Local

Agreement. The ATB group consists of several classifications of workers within its group, and the Memorandum of Understanding provides that there are no lines of demarcation between the skilled trades in this group. Therefore, GM may assign non-pipefitters work that is normally within the pipefitter classification. Specifically, the Memorandum of Understanding states as follows:

> Employees assigned to this group will perform tasks necessary for the completion of the finished product to the fullest extent of their skill levels and ability, consistent at all times with plant safety practices. Although employees will maintain their skilled trades classifications, no lines of demarcation restrictions will be placed on skilled group members working together.
>
> Overtime will be offered in accordance with the...Mansfield local overtime agreement except that weekend and holiday overtime offered to employees in the ATB group will be on a percentage basis ... reflective of the ATB group population on the shift, in accordance with local equalization of hours practices....

Memorandum of Understanding, ¶¶ 3,8.

Overtime

Plaintiff alleges that during his employment at GM's Mansfield plant, he was denied overtime and overtime opportunities "which are regularly afforded-

similarly situated white contemporaries." Amended Complaint ¶ 12(A). Further, he claims that he complained of the above to his superiors, with no redress. Id. In support of his allegation, Mr. May claims that employees from other departments would be brought into his department in order to work the overtime, all of whom were non-African-Americans. Mr. May also states that substantially more overtime assignments were being awarded to white employees working fast shift for the purpose of avoiding to award overtime to Mr. May. Mr. May claims that the allocation of overtime was not in accordance with the National Agreement or the Local Agreement.

Plaintiff allegedly became concerned with the allocation of overtime in or about 1998, filing seven grievances, with the assistance of Local 549, between March and June of 1999. Plaintiff's grievances concerned the overtime board and GM's alleged inaccurate record-keeping. None of the seven grievances alleged discrimination with regard to the allocation of overtime hours. The grievances were investigated. GM denied all allegations.

In one instance, Plaintiff claimed that the overtime board was off by approximately 77 hours (in 1997 and additional hours in 1998). As a result of the investigation, the local Committeeman, Craig Ferguson, determined that Mr. May may have been overcharged 43.5 hours. The Local Union offered to settle the grievance with Mr. Mills, the other second-shift pipefitter, being charged an additional 43.5 hours of overtime in order to "equalize" the time with Plaintiff. Plaintiff, however, refused this offer of settlement. Due to the alleged lack of documentation on Mr. May's part, Local 549 dropped the case.

In another instance, Committeeman Ferguson investigated allegations of violations of the equalization of overtime pay in the ATB group; and he filed grievances on behalf of the members of the group, including Mr. May, alleging that some employees had worked 11.5 hours and others had worked 10 hours. Thus, the hours were not equalized. Thereafter, in October of 1999, GM and Local 549 reached a settlement concerning such overtime allocation wherein 200 hours of back pay were divided among approximately 49 employees. Plaintiff received 4.1 hours of back pay as a result of the settlement.

Discipline

Plaintiff was disciplined on several occasions during his employ at GM's Mansfield facility. According to Plaintiff, the disciplinary actions taken by GM were racially motivated. On January 13, 1998, Plaintiff reported to work as scheduled, though he claimed to be having foot pain and that he was at the facility only to seek treatment from the plant doctor. Plaintiff was observed staggering, and management determined that Plaintiff was under the influence of alcohol. Plaintiff was escorted home. Plaintiff denies that he had been intoxicated. Upon his return to work, three days later, GM issued a disciplinary layoff ("DLO') of one week. Pursuant to a settlement between GM and Local 549, this discipline was modified to a DLO of one week with three days suspended, and the discipline was removed from Plaintiff's record after six months.

Plaintiff was observed intoxicated for a second time on November 2, 1998. GM management refused his access to the plant, and when he returned to work

three days later, he was issued another DLO of one week for reporting to the facility under the influence of alcohol and in an unsafe condition. This discipline was also modified as part of a settlement between GM and Local 549. The DLO was reduced and removed from his record after six months.

On January 29, 1999, Plaintiff received a two-week DLO for leaving the plant during his shift without permission. Once again, the discipline was reduced; and it would be removed from his record after nine months if he had no further violations during that time period.

Finally, on July 1, 1999, Plaintiff was disciplined, once again, for reporting to work under the influence of alcohol. This time, Plaintiff received a 30-day suspension due to the previous disciplinary action. GM and Local 549 reached a settlement whereby Plaintiff's 30-day unpaid suspension was converted to a 30-day paid sick leave, with the condition that Plaintiff attend alcohol rehabilitation and follow-up counseling. Plaintiff denies that he has a problem with alcohol, however, he agreed to, and did, in fact, take the sick leave.

July 4th Shutdown

During Plaintiff's sick leave, GM's Mansfield facility closed for a two-week July 4th shutdown during which all employees took an enforced paid vacation. This policy is mandated in the National Agreement. Employees may apply for work during plant shutdown, as some work is performed during this time, and receive holiday pay. However, employees on sick leave are not eligible to work during the shutdown. Plaintiff claims that GM's refusal to permit him to work during

this discrimination. Specifically, he claims that had he not been on sick leave during the July 4th shutdown, he would have earned extra income. Plaintiff admits, however, that when he agreed to the settlement, he understood that he would not be permitted to work during the plant shutdown.

Welder classification

On June 17, 1999, the Mansfield facility posted job openings for a journeyman die welder and a journeyman gas/arc welder. Plaintiff and seven other employees applied for the position of gas/arc welder. Plaintiff was classified as a pipefitter and held a pipefitter card. Plaintiff filed for reclassification of his card to welder, providing information pertaining to his welding experience. On August 19, 1999, UAW International notified Mr. May that he had been reclassified from pipefitter to welder. However, on August 26, 1999, the Union revoked Plaintiffs welder card, noting that "further review of [his] application [for a welder card] shows that time used during [his] plumber apprenticeship was calculated as time credited towards the journeyman welder card" and "the pipefitter-plumber-steamfitter classification is not a related classification to the welder classification." Therefore, as UAW International stated, Plaintiff was required to show eight years experience as a welder and he had not done so. Plaintiffs pipefitter card was reinstated. Plaintiff appealed the Union's decision, which was rejected. In a letter dated October 15, 1999, UAW International Representative, Leon Klea, stated that Mr. May did not possess the requisite minimum eight years experience as a welder, and in fact, the welding experience he submitted on his initial application was "far below the necessary requirements." Mr. William French, who had more

seniority than Mr. May, was awarded the welder position. Plaintiff, however, claims that he was denied this welder position on account of his race.

Summary Judgment Standard

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party

> [A] party seeking summary judgment always beats the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citing Fm. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an

essential element of their case. Tolton v. American Biodyne, Inc., 48 F.3d 937, 941 (6th Cir. 1995) (citing Celotex, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff" Copeland v. Machulis, 57 F.3 d 476, 479 (6th Cir. 1995) (citing Anderson, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. Anderson, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir.1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." Cox v. Kentucky Dep't of Transp., 53 F.3d 146, 149 (6th Cir.1995). Federal Rule of Civil Procedure 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

> provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

FED. R Civ. P. 56(e). The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. Id.

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "' it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."' Wiley v. United States, 20 F.3d 222, 225-26 (6th Cir.1994) (quoting Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir.1988)). Federal Rule of Civil Procedure 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 22526 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect. If the opposing party:

> fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." Anderson, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. Id. at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id.

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250.

Discussion

Plaintiff alleges that Defendants' actions violated 42 U.S.C. § 1981, Title VII, and Chapter 4112 of the Ohio Revised Code. Plaintiff further alleges that the acts of UAW International and UAW Local 549 constitute a breach of

contract. The United States Supreme Court has held that race discrimination claims under 42 U.S.C. § 1981 are analyzed under the same evidentiary framework enumerated by the federal courts for race discrimination claims pursuant to Title VII. Patterson v. McLean Credit Union, 491 U.S.164,186 (1989). Furthermore, federal case law interpreting Title VII "is generally applicable to cases involving alleged violations of RC. Chapter 4112." Ohio Civil Rights Comm'n v. Ingram, 630 N.E.2d 669, 672 (Ohio 1994). Therefore, Plaintiff's discrimination claims will be analyzed under one standard as set forth below.

A plaintiff seeking to establish a Title VII discrimination claim has available two distinct theories of discrimination. Flatt v. Electric Research Mfg. Corp., 103 F. 3d 129, 1996 WL 694151, at *4 (6th Cir. Dec. 3, 1996) (unpublished) (citation omitted). "The first, disparate treatment, `occurs when an employer treats some employees less favorably than others because of race, religion, sex, or the like,' and requires proof of discriminatory motive." Id. (citing Huguley v. General Motors Corp., 52 F.3d 1364, 1370 (6th Cir.1995) (citation omitted)). The second, disparate impact, does not require proof of discriminatory motive, "because it is predicated on a theory that discrimination has `result[ed] from facially neutral employment practices that have a disproportionately negative effect on certain protected groups . . . . "' Flatt,1996 WL 694151, at *4 (citation omitted). In this case, Plaintiff seeks to pursue his claim of race discrimination against both Defendants under the theory of "disparate treatment."

I. Disparate Treatment Claim

Title VII prohibits employers from discriminating against employees on the basis of race. 42 U.S.C. § 2000e. "It is well established that the burden is on an employment discrimination plaintiff to establish a prima facie case of

discrimination." Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir.1992) (citations omitted). A plaintiff may establish a claim of disparate treatment in one of two ways--via indirect or direct evidence. First, a plaintiff may establish a prima facie case of discrimination by showing that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and, (4) he was replaced by a person outside the class. Id, Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir.1995). If a plaintiffs claim is that a similarly situated non-minority was treated more favorably, the fourth prong of the test is altered, i.e., "a plaintiff can also make out a prima facie case by showing, in addition to the first three elements, that `a comparable non-protected person was treated better'." Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246. Second, a plaintiff may alternatively establish her case "by presenting credible, direct evidence of discriminatory intent." Mitchell, 964 F.2d at 582 n.4.

In the absence of direct evidence, the court applies the familiar burden-shifting approach for inferential proof of discrimination set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). While the burden of persuasion remains with the plaintiff, the burden of production shifts between the parties. The Sixth Circuit has described this approach as follows: "(1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscrimimtory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual." Harrison v. Metropolitan Gov't of Nashville and Davidson County, 80 F. 3d 1107, 1115 (6th Cir. 1996). In establishing pretext, the plaintiff

"may succeed ... either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. However, in order to withstand summary judgment, a plaintiff must come forward with evidence demonstrating that the defendant's articulated nondiscriminatory justification is not true. Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1166 (6th Cir.1996), amended on denial of reh g, 97 F.3d 833 (6th Cir.1996); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1082 (6th Cir.1994). To make a case on the credibility of his employer's explanation, the plaintiff is required to show by a preponderance of the evidence (1) that defendant's proffered reasons for the adverse employment action had no basis in fact, (2) the proffered reasons did not actually motivate the action, or (3) the reasons were insufficient to motivate the adverse action. Manzer, 29 F.3d at 1082.

In the instant case, Plaintiff does not present any direct evidence of discrimination, and therefore, he must proceed with indirect evidence and the familiar burden shifting approach. Plaintiff claims that he was treated differently than similarly situated non-minority employees with respect to overtime opportunities, the handling of grievances regarding overtime, working overtime during the plant shut-down, his disciplinary actions, and the denial of a welding position. Because Plaintiff has failed to show that a "comparable non protected person was treated better," his claim for race discrimination based upon the theory of disparate treatment must fail. Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246.

Plaintiff contends that during his employment at GM's Mansfield facility, he was regularly subjected to disparate treatment based upon his race–African-American. He

states that "a large number of overtime assignments were given to white employees over blacks, including [Plaintiff]." Plaintiff's Memo. Contra, p. 4. He further states that more overtime assignments were being awarded to "white employees working first shift than [to] second shift ... to avoid awarding overtime and commensurate pay to him." Memo. Contra, p. 3. Plaintiff also claims that "equalization of overtime" was not posted, as required, in his dent. In support of such contentions, Plaintiff makes several general, self-serving allegations. He fails, however, to provide sufficient evidence to support the same.

With respect to overtime hours and opportunities, the record reflects that Defendants followed the procedures outlined in the National Agreement and Local Agreement concerning equalization of overtime, "employee-on-the-job" assignments, and overtime hours posted. Plaintiff has failed to provide evidence that any of the above was executed in a racially discriminatory manner. Moreover, he fails to provide any evidence that a similarly situated non-minority person received more overtime hours when Plaintiff was otherwise entitled to the same.

Between March and June of 1999, Plaintiff filed approximately seven grievances, with the assistance of Local 549, relating to overtime. None of the grievances alleged discrimination with respect to overtime assignments or postings; rather, they alleged that GM failed to accurately record overtime hours. GM denied the allegations, and they were all settled with Local 549. As a result of one settlement, Plaintiff received 4.1 hours of back pay. In equalizing the overtime hours, and due to the difficulty in calculating the disputed 200 hours of back pay allegedly owed the ATB group, the hours were divided equally among the group members, regardless of

race. Plaintiff fails to show how such equalization treated a "comparable non-protected person" better than himself. Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246.

The one individual with which Plaintiff attempts to compare overtime assignments is Gary Mills, the only other second-shift pipefitter, who is Caucasian. Plaintiff claims that Mr. Mills received more overtime assignments. The record reflects, through the overtime boards, that Mr. Mills, on occasion, had more overtime than Mr. May. However, the record reveals that the converse is also true, and Plaintiff sometimes had more hours than Mr. Mills. Plaintiff has failed to demonstrate that the equalization of such hours between Mr. Mills and Plaintiff were, at any time, in violation of the collective bargaining agreements or were racially motivated.

In one instance, Plaintiff filed a grievance wherein he claimed that the overtime board was off by approximately 77 hours (for 1997 and 1998). Committeeman Ferguson investigated the grievance and determined that Plaintiff may have been overcharged 43.5 hours. In an effort to equalize the hours and settle Plaintiff's grievance, Local 549 offered to charge Mr. Mills an additional 43.5 overtime hours. Plaintiff, dissatisfied with the outcome, refused such offer. Thereafter, Local 549 claimed that there was insufficient documentation to pursue Mr. May's claim any further, and it dropped the case. While Plaintiff may have been dissatisfied with such result, he has failed to put forth sufficient evidence establishing that the alleged discrepancy with overtime hours between Mr. Mills and Plaintiff was discriminatory or that the Union's handling of the matter was discriminatory.

Plaintiff appears to claim that GM discriminated against him with respect to certain disciplinary action taken. Throughout Plaintiff's tenure at GM's Mansfield facility, management observed Plaintiff intoxicated, or under the influence of alcohol, on at least three occasions. As a result, Plaintiff was disciplined. In January of 1998, he received a disciplinary layoff ("DLO") of one week. Pursuant to Local 549's involvement, the matter was settled, and Plaintiff's DLO was reduced to one week with three days suspended, with the discipline being removed from his record after six months. In November of 1998, management, once again, issued a DLO for Plaintiff's intoxication. And once again, with the assistance of Local 549, the DLO was reduced and removed from his record after six months. Plaintiff also received a DLO for leaving the plant without permission, and such DLO was reduced and would be removed from his record if he incurred no further violations within nine months. Finally, in July of 1999, having observed Plaintiff under the influence of alcohol once again, management issued a 30-day unpaid suspension to Plaintiff. Local 549 negotiated a settlement on Plaintiff's behalf, whereby Plaintiff's suspension was converted to a 30-day paid sick leave.

Plaintiff has failed to demonstrate how any of the above disciplinary actions were racially motivated. Nor has he shown how a comparable, non-protected person was treated better in like circumstances. In fact, Plaintiff has admitted that Caucasian employees have previously been disciplined for being intoxicated at work. Moreover, in each instance, Plaintiff's DLO was modified to Plaintiff's advantage.

Plaintiff also contends that the fact that he was not permitted to work overtime during the plant's 4th of July shutdown while he was on sick leave was discrimination.

This claim is entirely without support. Plaintiff provides no evidence that other employees were, in fact, permitted to work overtime hours while on sick leave, non-minority or otherwise. The fact that Plaintiff believed the sick leave was forced upon him is irrelevant while Plaintiff refused to sign the settlement, he did, in fact, accept the sick leave and the pay associated with such leave.

One final event which Plaintiff claims was racially motivated is the denial of a welding position. In June of 1999, GM posted a job opening for a gas/arc welder. Plaintiff and seven other employees applied. In the meantime, Plaintiff filed for reclassification of his card from pipefitter to welder. On August 19, 1999, Plaintiff was notified that he had been reclassified to welder. However, shortly thereafter, the Union revoked Plaintiff's welder card, stating that Plaintiff did not possess the requisite eight years welding experience; rather, Plaintiff erroneously calculated his plumber apprenticeship towards the welder card. While Plaintiff claims that such denial was due to his race, he fails to support the allegation with evidence that a similarly situated non-minority, with the same qualifications, was, in fact, hired. To the contrary, the record reveals that two Caucasian members of Local 549, Thomas Karbula and David Overt, who also applied for a journeyman card as a welder, were also denied a welder's card Moreover, the person who was awarded the gas/arc welder position, William French, was qualified for the position and had several more years seniority than Mr. May. Mr. French is not "similarly situated." See Ercegovich v. Goodyear Rubber & Tire Co., 154 F.3d 344, 352 (6th Cir.1998). Thus, Plaintiff's claim of disparate treatment must fail.

II. Hostile Work Environment Claim

Plaintiff also alleges that Defendants' actions created a hostile work environment. A hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult "that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment..." Harris v. Forklift Sys., 510 U.S. 17, 21(1993); Faragher v. Boca Raton, 524 U.S. 775 (1998). In order to establish a prima facie case of hostile work environment based upon race, a plaintiff must demonstrate the following: (1) he is a member of a protected class; (2) he was subjected to unwelcome racial harassment; (3) the harassment was based upon race; (4) the harassment had the effect of unreasonably interfering with the employee's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of employer liability. See Hafford v. Seidner,183 F.3d 506, 512 (6th Cir.1999). The environment must be both objectively and subjectively offensive; in other words, the environment must be one that a reasonable person would find hostile or abusive and one that the victim, in fact, did perceive to be so. Harris, 510 U.S. at 21-22.

Plaintiff alleges in his Amended Complaint that the action and conduct of the Defendants created, and continue to create, a hostile environment for Plaintiff based upon his race. In support of such claim, Plaintiff states that he was denied overtime and overtime opportunities; he was disciplined; he was denied work during a plant shut-down; and he was denied a welding position. These allegations are essentially the same allegations made in support of Plaintiff's disparate treatment claim. Because Plaintiff fails to make a prima facie case of race discrimination with evidence of the

above, his claim that the same events establish a hostile work environment must also fail.

Furthermore, in considering all of the above allegations together, the same does not amount to a working environment that is so severe or pervasive as to alter Plaintiff's working conditions. See Harris, 510 U.S. at 21(1993); Faragher, 524 U.S. 775 (1998). Plaintiff cannot demonstrate that a reasonable person would find, in light of the evidence presented concerning overtime opportunities, that Plaintiff's working environment was intimidating, hostile, or offensive as to unreasonably interfere with his work performance. Rather, the record reflects that Plaintiff is generally responsible for his own interference, due, in large part, to his alleged substance abuse problem; and both GM and the Union went to great lengths to assist Plaintiff and to preserve his employment records with respect to the various disciplinary issues.

Plaintiff also sets forth three additional alleged incidents which Plaintiff contends constitute a hostile work environment. First, Plaintiff states that a derogatory cartoon was posted in the Mansfield plant without discipline. Plaintiff admits in his deposition that, after having complained to the Union, the cartoon was removed from the board on which it was posted. Second, Plaintiff states that a tag located on a piece of equipment contained a written notation: "worthless nigger." Other than learning that the incident was reported to management, he has no further knowledge about the derogatory notation. Finally, Plaintiff testified in his deposition that he, on three occasions, learned of a noose hanging in different locations throughout the plant. All incidents were reported either to plant security, management, or a union representative; and all nooses were removed.

While unfortunate, to say the least, the three aforementioned events do not establish that Defendants permitted a racially hostile work environment. Further, they do not demonstrate that Plaintiff's workplace was "permeated with intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter conditions of [Plaintiff's] employment" Harris, 510 U. S. at 21 (1993). Nor do such events arise to the level of an "abusive working environment" Id. Rather, while such derogatory language and pictures are undoubtedly offensive, taken as a whole, they are isolated incidents, and thus, are insufficient to create a hostile working environment. Therefore, Plaintiff has failed to establish a prima facie case of hostile work environment with the evidence presented in that he has failed to show that the alleged harassment had the effect of unreasonably interfering with his work performance by creating an intimidating hostile, or offensive work environment.

III. Breach of Contract Claim

Finally, Plaintiff alleges in his Fifth Claim of the Amended Complaint that the actions and conduct of Defendants UAW International and UAW Local 549, as outlined previously, constitute a breach of contract. Specifically, Plaintiff claims, in violation of the National Agreement and Local Agreement, that: he was entitled to, and denied, additional overtime within his department; he was entitled to, and denied, additional overtime within the ATB group; and he was denied the opportunity to work during the plant shut-down. Plaintiff claims that Local 549's failure to process his overtime grievances with respect to such overtime constituted a breach of the Agreements.

As previously stated, Plaintiff worked under a series of collective bargaining agreements negotiated between

GM and UAW known as the National Agreement, entered. into by GM and the UAW International, and the Local Agreement, entered into by GM and UAW Local 549. Such agreements establish the working conditions of UAW members employed by GM, including the rights and the responsibilities of the parties. Because Plaintiff's employment is governed by a collective bargainning agreement, this complaint is a hybrid Section 301 claim, and the Labor Management Relations Act ("LMRA")applies. See 29 U.S.C. § 185(a); Fox v. Parker Hannifin Corp., 914 F.2d 795, 799 (6th Cir.1990). The United States Supreme Court has read Section 301 to include individual collective bargaining workers' claims. Fox, 914 F.2d at 799 (citations omitted). Section 301 preempts only state law claims that are `substantially dependent on analysis of a collective-bargaining agreement...'" Id (citations omitted).

A hybrid Section 301 lawsuit "implicates the interrelationship among a union member, his union, and his employer." Vencl v. International Union of Operating Engineers, Local 18,137 F.3d 420, 424 (6th Cir.1998)(citing White v. Anchor Motor Freight, Inc., 899 F.2d 555, 561 (6th Cir.1990)). Under Section 301, jurisdiction exists when a union member alleges a breach of a collective bargaining agreement. See 29 U.S.C. § 185(a). In order to recover against a union under Section 301, the union member must prove the following: (1) that the employer breached the collective bargaining agreement; and (2) that the union breached its duty of fair representation. White, 899 F.2d at 559. The employee, therefore, must necessarily demonstrate both violations, or he cannot succeed against either party. Vencl,137 F.3d at 424. "[T]he validity of any hybrid 301 claim is anchored as equally in a finding that the union has breached its duty of fair representation as it is in a finding that the collective bargaining agreement has

been breached and that an arbitrator or its equivalent erroneously failed to rule in favor of the grievant employee." White, 899 F.2d at 560.

As dictated by the United States Supreme Court in Vaca v. Sipes, 3 86 U.S. 171,190 (1967), a breach of the duty of fair representation ("DFR") occurs only when a union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." In father limiting the application of such claims, the Sixth Circuit has held that the duty of fair representation is implicated only when an individual or group is treated differently by a union-either through discriminatory, bad faith, or arbitrary conduct--than another individual or group. See NLRB v. Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 782 F.2d 46, 52-53 (6th Cir.1986).

In the instant case, Plaintiff failed to establish that the Union's actions with respect to his overtime hours or the handling of his grievances concerning the overtime were "arbitrary, discriminatory, or in bad faith." Vaca, 386 U.S. at 190. Thus, Plaintiff has failed to demonstrate that either UAW International or UAW Local 549 has breached its duty of fair representation.

With respect to the departmental overtime issue, Local Union Committeeman Craig Ferguson met numerous times with Mr. May in attempts to investigate the grievance and negotiate a settlement. The Union proposed a settlement upon discovering that Plaintiff may have been overcharged 43.5 hours. The Union offered to charge the remaining pipefitter, Mr. Mills, an additional 43.5 hours in order to equalize the time between the two gentlemen. Mr. May refused the offer. In its discretion, and as a result of the alleged lack of

evidence on Mr. May's part, Local 549 dropped the case. Plaintiff failed to provide evidence that Local 549's dropping such case was discriminatory or arbitrary in some manner. The grievances, in fact, filed in the summer of 1999, related to overtime issues commencing as far back as 1997 and 1998. Unions maintain wide discretion "to act in what they perceive to be their members' best interests." Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir.1985).

With respect to the ATB group overtime grievance, Mr. May was included in the group grievance. Committeeman Ferguson investigated allegations of violations of the equalization of overtime pay within the group, and he filed grievances on behalf of the members accordingly. Following the investigation, GM and Local 549 negotiated a settlement whereby approximately 200 hours of back pay were divided among the approximately 49 members of the group. The Union determined that calculation of the hours would be too difficult. Thus, Plaintiff received 4.1 hours of back pay as a result of the settlement. While Mr. May was dissatisfied with the settlement, his dissatisfaction is not a basis for his claims that Local 549 acted arbitrarily or discriminatory. The fact that the hours were divided equally among the members, regardless of their race, demonstrates that the settlement was effected in a non-discriminatory fashion. Once again, Local 549 exercised its discretion in negotiating the best settlement it could in the best interests of its members.

Plaintiff also objects to the actions of Union defendants with respect to the 4th of July plant shut-down. Plaintiff claims that he was denied overtime opportunity during this time because he took an "involuntary" sick leave. However, the Union did not pursue any claims for lack of overtime work at this time due to the fact that Local

549 had negotiated a settlement on behalf of Plaintiff whereby Plaintiff would be required to take a 30-day paid sick leave rather than a 30-day unpaid suspension. Employees on sick leave are not permitted to work overtime. While Mr. May may have objected to the initial discipline and refused to sign the Settlement Agreement entered into between GM and Local 549, he agreed to take the sick leave. In light of the above actions taken by the Union on Plaintiffs behalf (in negotiating an unpaid suspension into a paid sick leave), Plaintiff cannot establish that such conduct was discriminatory or made in bad faith when the ultimate outcome was to Mr. May's advantage. This is especially true in light of the fact that Plaintiff admitted that he needed the money during that 30-day time period.

Based upon the above, Plaintiff has failed to show that Defendant UAW International or UAW Local 549 has acted in a discriminatory or arbitrary fashion. Therefore, he cannot show that the Union breached the duty of fair representation owed to its members. Accordingly, Plaintiff cannot establish a claim for breach of contract against the Union Defendants, as a union member in a Section 301 action must establish both breach of the collective bargaining agreement and breach of its duty of fair representation in order to maintain such action.

Conclusion

For the reasons stated above, the Court finds there are no genuine issues of material fact which remain to be litigated on all counts of Plaintiff's Amended Complaint. Accordingly, Defendants UAW International and UAW Local and GMC's Motions for Summary Judgment (ECF #30, #31) are GRANTED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District
Judge

DATED: April 29, 2002

FOOTNOTES

[1] The factual summary is based on the parties' statements of facts. Those material facts which are controverted and supported by deposition testimony, affidavit, or other evidence are stated in a light most favorable to Plaintiff, the non-moving party.